



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

JAMAUL L. MONK,

Petitioner,

v.

JOHN MARSHALL,

Respondent.

Case No. CV 10-01446 RSWL (AN)

**ORDER TO SHOW CAUSE RE  
DISMISSAL OF PETITION FOR  
WRIT OF HABEAS CORPUS BY A  
PERSON IN STATE CUSTODY AS  
TIME-BARRED**

**I. BACKGROUND**

Before the Court is a Petition for Writ of Habeas Corpus ("Petition") filed by Jamaul L. Monk ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and raises two claims directed at Petitioner's 2005 conviction of first degree attempted murder, which he sustained following a jury trial in the Los Angeles County Superior Court (case no. MA026337). For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

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## II. DISCUSSION

### A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, requires a judge to “promptly examine” a habeas petition and “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

### B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court, because the Petition was filed after April 24, 1996, AEDPA’s enactment date. 28 U.S.C. § 2244(d)(1); *see Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In most cases, the limitations period begins to run from “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

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1       The face of the Petition establishes that Petitioner sustained his underlying  
 2 conviction on September 23, 2005, and that he was sentenced on April 5, 2006. (Pet.  
 3 at 2.) The Petition and relevant state court records<sup>1/</sup> also establish that the California  
 4 Court of Appeal, Second Appellate District, Division Three, denied his direct appeal  
 5 on May 31, 2007 (case no. B190887), and the California Supreme Court denied his  
 6 petition for review of that decision on August 15, 2007 (case no. S154225). (Pet. at  
 7 2-3; California appellate records.) Neither the Petition nor state court records establish  
 8 that Petitioner filed a petition for certiorari with the United States Supreme Court.  
 9 Therefore, for purposes of AEDPA's limitations period, Petitioner's judgment became  
 10 final on November 13, 2007, the ninetieth day after the state high court denied his  
 11 petition for review and the last date for him to file a petition for certiorari with the  
 12 Supreme Court. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of  
 13 limitations then started to run the next day, November 14, 2007, and ended a year later  
 14 on November 13, 2008. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v. Stewart*, 251  
 15 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period begins to run on the day  
 16 after the triggering event pursuant to Fed. R. Civ. P. 6(a)). Petitioner did not sign,  
 17 date, and constructively file his pending Petition in this matter until February 11,  
 18 2010<sup>2/</sup> -- 455 days (approximately 1 year, 3 months) after the expiration of the  
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 21       <sup>1/</sup> The Court takes judicial notice of Petitioner's records in the state appellate  
 22 courts, which are available on the Internet at <http://appellatecases.courtinfo.ca.gov>.  
 23 *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take  
 judicial notice of relevant state court records in federal habeas proceedings).

24       <sup>2/</sup> Pursuant to the "mailbox rule," a *pro se* prisoner's habeas petition is  
 25 deemed to be filed on the date the prisoner delivers the petition to prison authorities  
 26 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379  
 27 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The pending Petition  
 28 was filed by the Clerk on February 26, 2010, and Petitioner dated the Petition  
 February 18, 2010. (Pet. at 1, 8.) However, for purposes of the timeliness analysis,  
 (continued...)

1 limitations period.

2 Accordingly, absent some basis for tolling or an alternative start date to  
3 AEDPA's limitations period under 28 U.S.C. § 2244(d)(1), the pending Petition is  
4 time-barred.

### 5 **C. Statutory Tolling**

6 AEDPA includes a statutory tolling provision that suspends the limitations  
7 period for the time during which a "properly-filed" application for post-conviction or  
8 other collateral review is "pending" in state court. 28 U.S.C. § 2244(d)(2); *Waldrip*  
9 *v. Hall*, 548 F.3d 729, 734 (9th Cir. 2008); *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th  
10 Cir. 2005). An application is "pending" until it has achieved final resolution through  
11 the state's post-conviction procedures. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S. Ct.  
12 2134 (2002). The limitations period is not tolled between the time a final decision is  
13 issued on direct state appeal and the time a state collateral challenge is filed because  
14 there is no case "pending" during that interval. *Thorson v. Palmer*, 479 F.3d 643, 646  
15 (9th Cir. 2007); *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). On collateral  
16 review, however, "intervals between a lower court decision and a filing of a new  
17 petition in a higher court," when reasonable, fall "within the scope of the statutory  
18 word 'pending'" thus tolling the limitations period. *Saffold*, 536 U.S. at 221, 223;  
19 *Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846 (2006) (*citing Saffold*).

20 Further, to qualify for statutory tolling during the time the petitioner is pursuing  
21 collateral review in the state courts, his *first* state habeas petition must be  
22 constructively filed *before*, not after, the expiration of AEDPA's one-year limitations  
23 period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2254  
24 does not permit the reinitiation of the limitation period that has ended before the state  
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26 <sup>2/</sup> (...continued)

27 the Court gives Petitioner the benefit of all doubt by assuming he constructively filed  
28 the Petition on February 11, 2010, the date he ostensibly signed his accompanying  
proof of service.

petition was filed”); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (stating that filing of state petition after AEDPA’s one-year time period has elapsed bars federal habeas review); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (“A state-court petition [] that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled”).

The face of the Petition indicates Petitioner constructively filed a habeas petition with the trial court on May 19, 2008, and that petition was denied the same day.<sup>3/</sup> (Pet. at 4.) The face of the Petition and state court records establish Petitioner next filed a habeas petition in the state court of appeal on July 14, 2008, which was denied on August 5, 2008 (case no. B209245). (Pet. at 4; California appellate records.) Finally, the face of the Petition and state court records establish Petitioner filed a habeas petition in the California Supreme Court on September 24, 2008 (case no. S166980), which was denied on April 15, 2009.<sup>4/</sup> (Pet. at 4-5; California appellate records). Given 333 days of statutory tolling,<sup>5/</sup> the limitations period was extended from November 13, 2008, to October 12, 2009. The Petition is still untimely by 122 days.

#### **D. Alternative Start of the Statute of Limitations**

##### **1. State-Created Impediment**

In rare instances, AEDPA provides that its one-year limitations period shall run from “the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the

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<sup>3/</sup> The mailbox rule also applies to *pro se* state habeas petitions. *Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003).

<sup>4/</sup> Orders of the California Supreme Court denying habeas petitions are final upon filing. CAL. CT. R. 8.532(b)(2)(C).

<sup>5/</sup> Petitioner was entitled to 331 days of statutory tolling, but the Court added two days since the last day fell on a Saturday. Fed. R. Civ. P. 6(a)(1)(C).

1 applicant was prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B).  
2 Asserting that the statute of limitations was delayed by a state-created impediment  
3 requires establishing a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th  
4 Cir. 2002). Thus, a claim under this provision “must satisfy a far higher bar than that  
5 for equitable tolling.” *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir. 2009).  
6 Petitioner’s filings do not set forth any facts that show he is entitled to relief under this  
7 provision.

## 8 **2. Newly Recognized Constitutional Right**

9 AEDPA provides that, if a claim is based upon a constitutional right that is  
10 newly recognized and applied retroactively to habeas cases by the United States  
11 Supreme Court, the one-year limitations period begins to run on the date which the  
12 new right was initially recognized by the United States Supreme Court. 28 U.S.C. §  
13 2244(d)(1)(C). Petitioner’s filings do not set forth any facts that show he is entitled  
14 to relief under this provision.

## 15 **3. Discovery of Factual Predicate**

16 AEDPA also provides that, in certain cases, its one-year limitations period shall  
17 run from “the date on which the factual predicate of the claim or claims presented  
18 could have been discovered through the exercise of due diligence.” 28 U.S.C. §  
19 2244(d)(1)(D). Petitioner’s filings do not set forth any facts that show he is entitled  
20 to relief based upon a late discovery of the factual predicate.

## 21 **E. Equitable Tolling**

22 The United States Supreme Court has not yet decided whether AEDPA’s  
23 limitations period allows for equitable tolling but it has assumed without deciding that  
24 it is available where the parties have agreed. *Lawrence v. Florida*, 549 U.S. 327, 336,  
25 127 S. Ct. 1079 (2007) (“We have not yet decided whether § 2244(d) allows for  
26 equitable tolling.”); *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005)  
27 (“We have never squarely addressed the question whether equitable tolling is  
28 applicable to AEDPA’s statute of limitations”).



1 Although the Ninth Circuit has found equitable tolling is available, *Harris v.*  
2 *Carter*, 515 F.3d 1051, 1054 n.4. (9th Cir. 2008), it has cautioned, “[e]quitable tolling  
3 is justified in few cases,” and that “the threshold necessary to trigger equitable tolling  
4 [under AEDPA] is very high, lest the exceptions swallow the rule.” *Spitsyn v. Moore*,  
5 345 F.3d 796, 799 (9th Cir. 2003); *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir.  
6 2002) (same). “This high bar is necessary to effectuate the ‘AEDPA’s statutory  
7 purpose of encouraging prompt filings in federal court in order to protect the federal  
8 system from being forced to hear stale claims.’” *Mendoza v. Carey*, 449 F.3d 1065,  
9 1068 (9th Cir. 2006). Further, “[e]quitable tolling determinations are ‘highly fact-  
10 dependent.’” *Id.* A petitioner “bears the burden of showing that equitable tolling is  
11 appropriate.” *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005).

12 Moreover, in *Pace*, the Supreme Court clearly established that “a litigant  
13 seeking equitable tolling bears the burden of establishing two elements: (1) that he  
14 has been pursuing his rights diligently, and (2) that some extraordinary circumstance  
15 stood in his way.” *Pace*, 544 U.S. at 418; *Lawrence*, 549 U.S. at 336. *Pace*’s  
16 diligence prong requires the petitioner to show he engaged in reasonably diligent  
17 efforts to file his § 2254 petition throughout the time the limitations period was  
18 running. *Mendoza*, 449 F.3d at 1070; *see also Smith v. McGinnis*, 208 F.3d 13, 17 (2d  
19 Cir. 2000) (stating that equitable tolling requires a showing that “the party seeking  
20 equitable tolling must have acted with reasonable diligence throughout the period he  
21 seeks to toll” and “extraordinary circumstances prevented him from filing his petition  
22 on time”). The petitioner must also demonstrate that he exercised reasonable diligence  
23 in attempting to file his habeas petition after the extraordinary circumstances began  
24 otherwise the “link of causation between the extraordinary circumstances and the  
25 failure to file [is] broken.” *Spitsyn*, 345 F.3d at 802. *Pace*’s “extraordinary  
26 circumstances” prong requires the petitioner to “additionally show that the  
27 extraordinary circumstances were the cause of his untimeliness, and that the  
28 extraordinary circumstances made it impossible to file a petition on time.” *Ramirez*,

1 571 F.3d at 997 (internal quotations and citations omitted). Petitioner's filings do not  
2 set forth any facts that show he is entitled to equitable tolling.

3 **ORDER**

4 Based on the foregoing, the Court finds the Petition is untimely. Accordingly,  
5 Petitioner shall have until **March 24, 2010**, to file a written response and show cause  
6 why his Petition should not be dismissed with prejudice because it is time-barred. In  
7 responding to this Order, Petitioner must show by declaration and any exhibits what,  
8 if any, factual or legal basis he has for claiming that the Court's foregoing analysis is  
9 factually or legally incorrect, or that AEDPA's one-year statute of limitations should  
10 be tolled, or the start date extended. If Petitioner contends he is entitled to tolling  
11 because of a lack of access to the prison law library due to a purported lockdown or  
12 some other state-created impediment, his written response must be supported by a  
13 declaration from the warden or prison librarian verifying that the law library and  
14 library materials were unavailable throughout the relevant time period because of the  
15 lockdown or other stated reason. Further, Petitioner must demonstrate that, during the  
16 time access to the prison law library was allegedly unavailable, he made requests for  
17 legal materials to be brought to his cell and those requests were denied.

18 **Petitioner is warned that if a timely response to this Order is not made,**  
19 **Petitioner will waive his right to do so and the Court will, without further notice,**  
20 **issue an order dismissing the Petition, with prejudice, as time-barred. Further,**  
21 **if Petitioner determines the Court's above analysis is correct and the Petition is**  
22 **clearly time-barred, he should file a Request For Voluntary Dismissal of this**  
23 **action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response to this Order.**

24  
25 IT IS SO ORDERED.

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27 DATED: March 4, 2010

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ARTHUR NAKAZATO  
UNITED STATES MAGISTRATE JUDGE